BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD OF THE STATE OF CALIFORNIA

AB-8293
File: 21-257061 Reg: 03056360

HAWAII SUPER MARKET, INC., dba Hawaii Super Market
120 East Valley Boulevard, San Gabriel, CA 91776,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John P. McCarthy

Appeals Board Hearing: May 5, 2005
Los Angeles, CA

ISSUED JULY 6, 2005

Hawaii Super Market, Inc., doing business as Hawaii Super Market (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 20 days for appellant's clerk selling an alcoholic beverage to a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant Hawaii Super Market, Inc., appearing through its counsel, Joshua Kaplan, and the Department of Alcoholic Beverage Control, appearing through its counsel, John W. Lewis.

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[1]The decision of the Department, dated May 13, 2004, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on February 22, 1991. On December 21, 2003, the Department filed an accusation against appellant charging that, on June 19, 2003, appellant's clerk, Nga Ho (the clerk), sold an alcoholic beverage to 19-year-old Hong Tang. Although not noted in the accusation, Tang was working as a minor decoy for the San Gabriel Police Department at the time.

At the administrative hearing held on April 2, 2004, documentary evidence was received and testimony concerning the sale was presented by Tang (the decoy), by the clerk, and by Gerard Ngo, vice president of appellant corporation.

Subsequent to the hearing, the Department issued its decision which determined that the violation charged had been proven, and no defense had been established.

Appellant has filed an appeal making the following contentions: (1) The decision is not supported by the findings and the findings are not supported by substantial evidence; (2) Business and Professions Code section 24210 is unconstitutional; and (3) the penalty is excessive.

DISCUSSION

I

Appellant contends that the decision is not supported by the findings and the findings are not supported by substantial evidence. More specifically, appellant contends that the decoy operation violated rules 141(a) and 141(b)(2)[2]; that the Department intentionally failed to retain and produce the items purchased and the money used to purchase the items; and the Department failed to carry its burden of

[2]References to Rule 141 and its subdivisions are to section 141 of title 4 of the California Code of Regulations, and to the various subdivisions of that section.

proof because it did not prove that the beverage purchased was an alcoholic beverage. In addition, appellant raises the defenses of outrageous police conduct and entrapment.

Rule 141(a) requires that law enforcement agencies conduct minor decoy operations "in a fashion that promotes fairness," and rule 141(b)(2) requires that the decoy's appearance when he or she is purchasing from the seller of alcoholic beverages, be that which could generally be expected of a person under the age of 21.

The only argument appellant presents in support of its contention that rule 141(b)(2) was violated is that the decoy looked old enough to purchase alcoholic beverages in three out of the six off-sale licensed premises he visited that day. We find this totally unpersuasive.

In *7-Eleven & Jain* (2004) AB-8082, the decoy was sold alcoholic beverages in 80 percent of the licensed premises he visited, and in none of them was he asked for identification. In rejecting this "success rate" as proof the decoy violated 141(b)(2), the Board said:

> Although an 80 percent purchase rate during a decoy operation raises questions in reasonable minds as to the fairness of the decoy operation, that by itself is not enough to show that rule 141(a) or rule 141(b)(2) were violated. Such a per se rule would be inappropriate, since the sales could be attributable to a number of reasons other than a belief that the decoy appeared to be over the age of 21.

This Board has often said that, in the absence of very unusual circumstances, it will not disturb an ALJ's determination with regard to compliance with rule 141(b)(2), and we certainly have no reason to do so in this case. The ALJ had the benefit of observing the decoy at the hearing, an opportunity this Board did not have. The Appeals Board has only the cold record and a copy of a photograph to look at, and we are not in a position to second-guess the trier of fact. Based on the photograph of the

decoy taken the day of the decoy operation, however, we would not hesitate to agree with the ALJ's assessment.

We also note that this issue, although mentioned by counsel at the hearing, was essentially negated by the testimony of the clerk herself. She said she sold the beer even after looking at the decoy's California driver's license because she confused the legal age to buy cigarettes, 18, with the legal age to buy alcohol. In other words, she did not think the decoy appeared to be over the age of 21; she simply made a mistake.

Appellant argues that under *People v. Hitch* (1974) 12 Cal.3d 641 [117 Cal.Rptr. 9], the Department's failure to retain and produce the items purchased and the money used to purchase the items should result in excluding any reference to that evidence. However, *People v. Hitch* was declared to be superceded 15 years ago and is no longer good law in California. The California Supreme Court explained:

> *Hitch* established that the prosecution's due process duty to disclose material evidence creates a corresponding obligation to preserve such evidence. (*Id*. at pp. 650, 652-653.) The rule in *Hitch* has been superseded in California by the principles enunciated in [*California v.*] *Trombetta* [(1984) 467 U.S. 479 [104 S.Ct. 2528, 81 L.Ed.2d 413] (*Trombetta*)] and [*Arizona v.*] *Youngblood* [(1988) 488 U.S. 51 [109 S.Ct. 333, 102 L.Ed.2d 281] *(Youngblood)*]. (*People v. Cooper* (1991) 53 Cal.3d 771, 810-811 [281 Cal.Rptr. 90, 809 P.2d 865] (*Cooper*); *People v. Johnson* (1989) 47 Cal.3d 1194, 1233-1234 [255 Cal.Rptr. 569, 767 P.2d 1047]). Under these federal decisions, a defendant claiming a due process violation based on the failure to preserve evidence must show the exculpatory value of the evidence at issue was apparent before it was destroyed, and that the defendant could not obtain comparable evidence by other reasonable means. (*Trombetta*, *supra*, 467 U.S. at p. 489 [104 S.Ct. at p. 2534].) The defendant must also show bad faith on the part of the police in failing to preserve potentially useful evidence. (*Youngblood*, *supra*, 488 U.S. at p. 58 [109 S.Ct. at pp. 337-338].) "The presence or absence of bad faith by the police . . . must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed." (*Id*. at p. 57, fn. * [109 S.Ct. at p. 337].)

(People v. Frye (1998) 18 Cal.4th 894, 942-943 [959 P.2d 183; 77 Cal.Rptr.2d 25].)

Appellants do not argue that they have met the more restrictive test of *Trombetta*, *supra*, and we see no way that *Trombetta* could be satisfied in this case. To name just one deficiency, the can of beer clearly would not be exculpatory evidence for appellants.

Appellant argues the Department did not prove that what was purchased was an alcoholic beverage. We disagree. The decoy testified he bought a six-pack of Miller Lite beer; the clerk testified she sold him alcohol; and the copy of the receipt the decoy received when he made his purchase shows the purchase to be "Miller Lite 6 Pack – 12 Oz" and "6 Pack Beer." This evidence and the lack of any evidence that the six-pack contained other than Miller Lite beer, is sufficient to prove the decoy purchased beer, an alcoholic beverage. (See, e.g., *Molina v. Munro* (1956) 145 Cal.App.2d 601, 604-605 [302 P.2d 818]; *Berberian Enterprises, Inc*. (1999) AB-7256.)

The contentions of outrageous police conduct and entrapment have been raised before in a number of sale-to-minor cases, and the Board has routinely rejected them. In *CMPB Friends, Inc.* (2003) AB-8012, the Board's language was right on point for the present appeal:

> Appellant premises its argument that there was misconduct and entrapment by the Department on its assumption that there was a violation of Rule 141.
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> As the discussion in part I indicates, we are of the view that there was no violation of Rule 141.
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> Although appellant has cited a number of cases addressing the issues of police misconduct and entrapment, it has offered no coherent discussion of facts which might support either of the two theories. Consequently, no useful purpose would be served by addressing the cases cited by appellant.

(See also, e.g., *RTDD, Inc*. (2003) AB-8063; *Tesfayohanes* (2000) AB-7321; *Berberian Enterprises, Inc*., *supra*; *TBD Ent., Inc*. (1999) AB-7253; *Fourth Avenue Restaurant, Inc.* (1999) AB-7135; *Mi Place Ltd*. (1998) AB-6908; *Martin* (1997) AB-6698.)

II

Appellant contends that it was denied due process because the ALJ who presided over the hearing was an employee of the Department. Appellant asserts that Business and Professions Code section 24210, the code section which authorized the Department to appoint its own ALJ's, is unconstitutional. That section states:

> The department may delegate the power to hear and decide to an administrative law judge appointed by the director. Any hearing before an administrative law judge shall be pursuant to the procedures, rules, and limitations prescribed in Chapter 5 (commencing with section 11500) of Part 1 of Division 3 of Title 2 of the Government Code.

This is another issue raised time and time again, and which the Board has rejected every time. *RTDD, Inc.*, *supra*, explains why the Board consistently rejects this contention:

> The Appeals Board, as with other state agencies, lacks the power to declare a statute unconstitutional unless an appellate court has made such a determination. (Cal. Const., art. 3, §3.5.) None has. To the contrary, two courts of appeal have rejected constitutional challenges to the Department's employment of its own ALJ's. *(*See *CMPB Friends, Inc. v. Alcoholic Beverage Control Appeals Bd.* (2002) 100 Cal.App.4th 1250 [122 Cal.Rptr.2d 914] and *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2002) 99 Cal.App.4th 880 [121 Cal.Rptr.2d 753].)
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> The Board itself has rejected numerous challenges to the Department's use of its own ALJ's that were based on grounds other than the alleged [in]validity of section 24210. (See, e.g., *7-Eleven, Inc./Veera* (2003) AB-7890; *El Torito Restaurants, Inc.* (2003) AB-7891.)

III

Appellant contends the 20-day suspension imposed, or any suspension at all, is unfair, unreasonable, and "cruel and unusual punishment" in light of the official misconduct in this case and the evidence of appellant's substantial efforts to preclude such violations.

The Appeals Board may examine the issue of excessive penalty if raised by an appellant (*Joseph's of California. v. Alcoholic Beverage Control Appeals Bd.* (1971) 19 Cal.App.3d 785, 789 [97 Cal.Rptr. 183]), but will not disturb the Department's penalty order in the absence of an abuse of discretion. *(Martin v. Alcoholic Beverage Control Appeals Bd. & Haley* (1959) 52 Cal.2d 287, 291 [341 P.2d 296].) If the penalty imposed is reasonable, the Board must uphold it, even if another penalty would be equally, or even more, reasonable. "If reasonable minds might differ as to the propriety of the penalty imposed, this fact serves to fortify the conclusion that the Department acted within the area of its discretion." (*Harris v. Alcoholic Beverage Control Appeals Bd.* (1965) 62 Cal. 2d 589, 594 [43 Cal.Rptr. 633].)

Since there was no official misconduct, appellants' contention about the penalty being disproportionate automatically fails. As to the penalty's reasonableness, this was appellants' second sale-to-minor violation in seven months, and appellant's "substantial efforts to preclude such violations" appear to have been limited to measures taken after the violation in this case occurred, not following the prior sale-to-minor violation. The ALJ specifically noted that there was no evidence of any "action taken by Respondent between the first unlawful sale and the within sale." (Conclusions of Law 6.)

Appellant had maintained a discipline-free record for most of the 13 years it had been licensed. Although it appeared that the penalty for the earlier violation had been substantially mitigated because of appellant's good record,[3] the ALJ felt that some mitigation was still in order, so he reduced the 25-day suspension recommended by the Department to 20 days.

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[3]The penalty for that violation was a 10-day suspension with all 10 days stayed, conditioned on a one-year probationary period.

It is difficult to believe appellants are serious in their characterization of the penalty. There is nothing cruel, unusual, or excessive about the penalty in this matter.

ORDER

The decision of the Department is affirmed.[4]

SOPHIE C. WONG, MEMBER
FRED ARMENDARIZ, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

[4]This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 23090.7 of said code.

Any party, before this final order becomes effective, may apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final order in accordance with Business and Professions Code section 23090 et seq.